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Supreme Court, U.S.
FILED
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Docket No.:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES GOVERNMENT

ex rel. GIH-HORNG CHEN,

Petitioner,

v.

ZYGO CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Gih-Horng Chen
qui tam Petitioner, *pro se*
445 Laurel Grove Road
Middletown, Connecticut 06457
Tel.: (860) 344-8140

30 pp

QUESTIONS PRESENTED

I.

What should be the state-court version of the ***Erie*** Doctrine for federal law in the state court?

II.

Whether Chen's voluntary withdrawal in the state court was with prejudice as to his federal claim under the state-court version of the ***Erie*** Doctrine?

LIST OF PARTIES

The names of all the parties of this action appear in the case caption on the cover page.

Pursuant to Rule 29.6, the petitioner U. S. Government ex rel. Gih-Horng Chen states that the petitioner has no parent company or non-wholly owned subsidiary, and that the respondent Zygo Corporation, a publicly owned company, has no parent company or non-wholly owned subsidiary.

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OPINIONS BELOW

The summary order entered by the U. S. Court of Appeals is unpublished. (Appendix A) The judgment and order entered by the U. S. District Court are unpublished. (Appendix B)

JURISDICTION

The jurisdiction of this Court over this action is invoked under 28 U.S.C. § 1254(1).

The U. S. Court of Appeals entered the summary order on March 13, 1998. (Appendix A) The timely petition for a rehearing in banc was denied by the U. S. Court of Appeals on June 22, 1998. (Appendix C)

CONSTITUTIONAL PROVISIONS AND STATUTES

This petition generally concerns the False Claims Act, 31 U.S.C. §§ 3729 - 3733.

STATEMENT OF THE CASE

I. Connecticut State Court

On December 13, 1991, the *qui tam* petitioner Gih-Horng Chen (hereafter "Chen") filed an action in a Connecticut state court against his previous employer, the respondent Zygo Corporation (hereafter "Zygo"). No specific cause of action was invoked in his complaint. At the trial on April 30, 1993, Chen voluntarily filed a withdrawal of action, with an intent to join the U. S. Government to file an action in a district court under the False Claims Act against Zygo.

However, Connecticut General Statutes § 52-80 states that, after the commencement of a hearing, the plaintiff may withdraw the action only by leave of court.

After confirming Zygo's stipulation, the state court granted Chen's voluntary withdrawal and barred its reinstatement. The withdrawal form filed in the state court stated that: "This case is withdrawn as to all defendants without costs to any party." No other order or judgment was entered by the state court.

II. U. S. District Court

However, the U. S. Government declined Chen's request, and advised him to pursue himself for an action under the False Claims Act. On May 15, 1995, Chen filed a *qui tam* action in the district court for the District of Connecticut under the False Claims Act against Zygo for its conspiracy to defraud and its false claims to the U. S. Government, and for its retaliation against Chen as the whistle-blower employee.

On March 27, 1997, after both parties had filed respective motions for summary judgment, the district court entered an order and its final judgment against Zygo, and granted in part and denied in part both parties' motions for summary judgment. The district court ruled that Zygo had submitted a false claim in violation of the False Claims Act, and that Chen's retaliation claim under the False Claims Act was barred by the doctrine of *res judicata* based on his prior state court action against Zygo.

The district court constructed the *res judicata* bar by a chain of legal grounds, including:

1. Chen should have brought up his federal anti-retaliation claim under the False Claims Act in his prior state court action, since federal and state courts have concurrent jurisdiction over such claims, citing ***United States ex rel. Hartigan v. Palumbo Bros., Inc.,*** 797 F.Supp. 624, 631-633 (N.D. Ill. 1992);

2. Chen's voluntary withdrawal in the state court was a dismissal with prejudice that acted as a judgment on the merits of *res judicata* effect by the state court's order under the Connecticut state law; and

3. Federal courts must accord state court's judgments the same preclusive effect as other courts within that state under the Full Faith and Credit Clause of the U.S. Const. Art. IV, § 1.

III. U. S. Court of Appeals

On May 23, 1997, Chen appealed from the order and the final judgment of the district court to the U. S. Court of Appeals for the Second Circuit.

Chen argued that the *res judicata* bar to his whistle-blower claim should be reversed because:

1. Hypothetically, had Chen brought up his federal claim in addition to state claim in the state court, the state law should only apply to his state claim, and the federal law should govern Chen's federal claim, under a proposed state-court version of the ***Erie*** Doctrine;

2. As to his federal claim, Chen's voluntary withdrawal in the state court should be governed by federal law, not by state law, and should be without prejudice under the Two-Dismissal Rule, Fed. R. Civ. P. Rule 41(a)(1); and

3. In reviewing Zygo's motion for summary judgment, the court should resolve all the ambiguities and draw all the factual inferences in favor of Chen as the non-moving party under Fed. R. Civ. P. Rule 56.

The ***Erie*** Doctrine holds that:

> For state law in the federal court, except when a specific federal statute governs the matter, federal court must apply state substantive law and federal procedural law. A procedural matter is substantive within the meaning of ***Erie*** if it is outcome-determinative and no overriding federal-policy is involved in the matter.

Erie v. Tompkins, 304 U.S. 64 (1938); Chemerinsky, Federal Jurisdiction, 301-302 (2d Ed. 1994).

By applying the same principles of the ***Erie*** Doctrine, Chen proposed a state-court version of the ***Erie*** Doctrine as that:

> For federal law in the state court, except when a specific federal statute governs the matter, the state court must apply federal substantive law and state procedural law. A procedural matter is substantive within the meaning of ***Erie*** if it is outcome-determinative and no overriding state-policy is involved in the matter.

Chen's federal claim under the False Claims Act was governed by specific federal statutes 31 U.S.C. §§ 3729 - 3733, which explicitly specify the applications of the Federal Rules of Civil Procedure in the false claims actions. Moreover, Chen's withdrawal was a substantive matter within the meaning of ***Erie*** because it was outcome-determinative and no overriding state-policy was involved in the matter. Therefore, federal law should govern Chen's withdrawal in the state court as to his federal claim under the proposed state-court version of the ***Erie*** Doctrine.

Under the Two-Dismissal Rule, Fed. R. Civ. P. Rule 41(a)(1), an action may be dismissed by the plaintiff by stipulation without a court order, and the dismissal is without prejudice. Therefore, under the federal law, Chen's voluntary withdrawal in the state court did not require a court order and should be without prejudice as to his federal claim.

On the other hand, as to Chen's state claim, a court order was required for his withdrawal under the Connecticut state law. The state court's order applied to bar only his state claim.

Therefore, reviewing in favor of Chen as the non-moving party, federal law should govern Chen's federal claim in the state court and, as to his federal claim, Chen's voluntary withdrawal should be without prejudice under the federal Two-Dismissal Rule. The *res judicata* bar to Chen's federal whistle-blower claim should not be granted on Zygo's motion for summary judgment.

But the U. S. Court of Appeals affirmed the district court's judgment on March 13, 1998, and denied Chen's petition for a rehearing in banc on June 22, 1998.

REASONS FOR GRANTING THE PETITION

Over the past 60 years since 1938 when this Court entered the landmark decision in ***Erie v. Tompkins*** for state law in the federal court, the state-court version of the ***Erie*** Doctrine under the same principles for federal law in the state court has been absent.

With the trend favoring the concurrent jurisdiction by the state court on federal law, there has been a critical need for this Court to establish the absent state-court version of the ***Erie*** Doctrine as the governing guideline for all the courts in the nation.

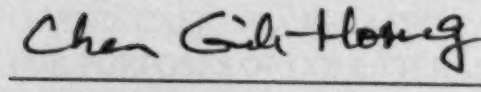
The state-court version of the ***Erie*** Doctrine would have its profound and fatal impact to all the actions involving federal law in the state court. As exemplified in this action involving the False Claims Act in a state court, Chen's voluntary withdrawal in the state court that was deemed with prejudice by the Connecticut state law would have been without prejudice by the federal law as to his federal claim under the state-court version of the ***Erie*** Doctrine.

Therefore, this petition presents a critical issue absent for 60 years and currently of exceptional importance to all the courts in the nation that warrants resolution by this Court at this time.

CONCLUSION

For the reasons set forth, the petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,



Gih-Horng Chen
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Date: September 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDNY/ unny
SUMMARY ORDER 95-cv-579
D. Squatrito

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of March one thousand nine hundred and ninety-eight.

PRESENT:

HON. JON O. NEWMAN,
HON. JOSÉ A. CABRANES,
HON. GILBERT S. MERRITT,*
Circuit Judges.

FILED
MAR 13 1998

_____ x

GIH-HORNG CHEN, individually and o/b/o UNITED STATES,
Plaintiff-Appellant,

-v.- No. 97-7718

ZYGO CORPORATION,
Defendant-Appellee.

_____ x

*Of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

APPEARING FOR APPELLANT: GIH-HORNG CHEN, *pro se,*
Middletown, Connecticut

APPEARING FOR APPELLEE: MIGUEL A. ESCALERA JR.,
Kainen, Starr, Garfield,
Wright & Escalera,
Hartford, Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut (Dominic J. Squatrito, *Judge),* and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiff-Appellant Gih-Horng Chen appeals from a judgment of the United States District Court for the District of Connecticut (Dominic J. Squatrito, *Judge)* granting, in part, defendant Zygo Corporation's motion for summary judgment based on *res judicata.*

Chen, a former employee of Zygo, filed a complaint on behalf of the United States Government pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.* Chen claimed that Zygo defrauded the Government by providing false information to a Government contractor, and that Zygo fired Chen in retaliation for raising concerns over the quality of the raw materials used to manufacture Zygo's product for the Government. The district court dismissed the retaliation claim because it found that Chen had previously brought a state retaliation action based on the same facts as in the present action, and that action was terminated on the merits, thereby barring Chen from bringing the same claim in federal court.

In Chen's May 1995 district court complaint, he alleged the following: The United States National Aeronautics and Space Administration ("NASA") contracted with the Johns Hopkins Applied Physics Laboratory to produce portions of a space satellite; Johns Hopkins sub-contracted with Zygo to produce optical prisms to be used in the satellite. Zygo cut the prisms from silica cubes manufactured by the Corning Glass Works. Zygo marked each cube with a serial number that traced the cube to a specific raw material lot provided by Corning. Zygo sub-contracted with the Nitto Optical Company to polish the cubes, a necessary step before Zygo was to cut the cubes into prisms. Nitto polished the serial numbers off the cubes, thereby destroying Zygo's ability to trace the cubes to specific raw material lots. Chen alleged that Corning later notified Zygo of problems with some of the silica from which the prisms were to be cut.

Chen alleged that his supervisor threatened his employment after Chen objected to an order to arbitrarily assign serial numbers to each cube. Chen reported that his supervisor again threatened his employment after Chen met with representatives from Johns Hopkins and Corning concerning the raw materials problem. Finally, Chen stated that he was given written notice to receive medical treatment as a condition of maintaining his job in October 1989, and was ultimately terminated in December 1989.

Chen also alleged that, in October 1992, he contacted NASA to inform it that Zygo falsified traceability records and covered up Corning's raw material problem. NASA declined to proceed with the present action, but advised Chen that he might pursue the present action on the United States government's behalf.

Zygo moved for summary judgment against Chen on the retaliation claim, arguing that that claim was previously brought in state court, and, therefore, was barred by the doctrine of *res judicata*. Chen, then represented by counsel, had earlier brought a retaliation action in the Connecticut Superior Court under Connecticut state law, alleging the same facts that he later alleged in the district court complaint in the instant action. The state action went to trial in April 1993; however, Chen decided to voluntarily withdraw the action before its conclusion. The state judge informed Chen in open court that his withdrawal would bar any further action concerning his retaliation claim. However, no formal order of dismissal was ever entered.

The district court ruled on the parties' cross-motions for summary judgment in March 1997. The district court entered summary judgment in Zygo's favor on Chen's retaliation claim because that claim was barred by the doctrine of *res judicata*. The district court entered summary judgment in Chen's favor on the false information claim, finding that Zygo did submit a false claim concerning the traceability of the raw materials. The district court awarded Chen three thousand dollars in damages, plus reasonable expenses, attorneys' fees, and costs, and awarded the United States seven thousand dollars in damages. *See* 31 U.S.C. § 3730(d)(2).

On appeal, Chen challenges only the dismissal of his federal retaliation claim. This Court reviews an order granting summary judgment *de novo* and asks whether the district court properly concluded that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202-03 (2d Cir. 1995). Under this standard, the district court properly granted Zygo's motion for summary judgment regarding Chen's retaliation claim.

Federal courts must accord state court judgments the same preclusive effect as other courts within that state. *See Allen v. McCurry,* 449 U.S. 90, 96 (1980) (citing U.S. Const. Art. IV, § 1 (full faith and credit clause); *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir. 1994). This Court must employ Connecticut's definition of *res judicata* in order to determine the preclusive effect of Chen's action in Connecticut state court. *See Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984); *Burgos,* 14 F.3d at 790. Under Connecticut's *res judicata* doctrine, an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions. *See Wade's Dairy, Inc. v. Town of Fairfield,* 181 Conn. 556, 559, 436 A.2d 24, 26-27 (1980).

Although Chen's state trial never reached final resolution, in Connecticut, a dismissal with prejudice is considered a dismissal on the merits. *See Milgrim v. DeLuca,* 195 Conn. 191, 197, 487 A.2d 522, 525 (1985). In fact, the state judge clearly stated that Chen's voluntary withdrawal precluded his action from ever being brought again. The fact that the state judge never entered a formal written order of dismissal does not affect this conclusion. *Cf Wakefield v. Northern Telecom, Inc.,* 769 F.2d 109, 114-15 (2d Cir. 1985) (district court's failure to enter a formal order of dismissal following plaintiff's voluntary withdrawal of an age discrimination claim did not preclude a *res judicata* defense).

Turning to the identity of the causes of action in state and district courts, Chen has raised the same retaliation claim in each forum based on identical facts. For purposes of *res judicata,* a cause of action in Connecticut is a group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief. *See Bridgeport Hydraulic Co. v.*

Pearson, 139 Conn. 186, 197, 91 A.2d 778, 782 (1952). Connecticut "prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it" so long as the claim arises from the same transactions or series of transactions. *Delahunty v. Massachusetts Mutual Life Ins. Co.*, 236 Conn. 582, 590, 674 A.2d 1290, 1294 (1996). Although Chen's claim was brought under a state law claim of retaliation rather than under the False Claims Act, it was, nonetheless, the same cause of action according to Connecticut's transactional analysis.

Because the transactions at issue in the state and federal complaints are identical, and Chen's retaliation claim was brought in the state action, the district court properly concluded that Chen's retaliation claim was barred by the doctrine of *res judicata*.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT,
George Lange III, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
MAR 27 1997

UNITED STATES GOVERNMENT, ex rel. GIH-HORNG CHEN	:	
v.	:	CASE NO.
ZYGO CORPORATION	:	3:95-CV-879 (DJS)

JUDGMENT

This action having come on for consideration of cross motions for summary judgment before the Honorable Dominic J. Squatrito, United States District Judge and,

The court having considered the motions and the full record of the case including applicable principles of law, and having filed a Memorandum Opinion and Order granting in part and denying in part the plaintiff's motion for summary judgment and granting in part and denying in part the defendant's motion for summary judgment, accordingly it is hereby

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered against the defendant, in favor of the plaintiff, Gih-Horng Chen in the amount of $3,000.00 plus statutory interest and reasonable attorneys' fees and costs and in favor of the United States Government in the amount of $7,000.00 plus statutory interest.

Dated at Hartford, Connecticut, this 27th day of March, 1997.

KEVIN F. ROWE, Clerk

By: /s/ Robin D. Tabora
Deputy in Charge

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES GOVERNMENT, ex rel. GIH-HORNG CHEN,	:	FILED MAR 27 1997
Plaintiff,	:	
v.	:	Civil No. 3:95-879 (DJS)
ZYGO CORPORATION,	:	
Defendant.	:	

MEMORANDUM OPINION AND ORDER

Pending before the court are cross motions for summary judgment. The plaintiff brings this action under the qui tam provisions of the False Claims Act (the "Act"), 31 U.S.C. §§ 3279 et seq, claiming that the defendant submitted a false claim to a government contractor. The plaintiff further alleges that the defendant terminated him in violation of the Act's anti-retaliation provision, 31 U.S.C. § 3730(h).

For the reasons stated below, the plaintiff's motion for summary judgment is granted in part and denied in part, and the defendant's motion for summary judgment is granted in part and denied in part.

I. Facts

A. Background

Based upon the briefs, evidentiary submission of the parties, and Local Rule 9 statements, the court finds the following to be undisputed.[1]

The genesis of this action concerns the TOPEX/POSEIDON space satellite built by the National Aeronautics and Space Administration ("NASA") as part of a joint United States and French program. The purpose of the satellite is to measure the altitude of the satellite's orbit above the earth's ocean surface.[2]

The satellite contains a Laser Retroflector Array (the "LRA"). The LRA is composed of prisms. On behalf of NASA, the United States Navy contracted with the Applied Physics Laboratory at Johns Hopkins University ("Johns Hopkins") in

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[1] The memoranda of law referred to in this opinion are the following: (1) Defendant's February 27, 1996 Memorandum in Support of Motion for Summary Judgment ("Def.'s Mem."); and (2) Plaintiff's April 24, 1996 Memorandum in Support of Motion for Summary Judgment and in Support of Opposition ("Pl.'s Mem.").

The evidentiary submissions referred to in this opinion are the following: (1) January 19, 1996 Affidavit of Sol Laufer ("Laufer Aff."); (2) January 15, 1996 Affidavit of Mark T. Boies ("Boies Aff."); and (3) February 2, 1993 Affidavit of Paul M. Schermerhorn ("Schermerhorn Aff.").

The complaints referred to in this opinion are: (1) December 13, 1991 Complaint filed in State court ("State Compl."); and (2) May 15, 1995 federal complaint ("Compl.").

[2] Pl.'s Mem. at 3.

Laurel, Maryland to build the LRA. In turn, Johns Hopkins, on July 11, 1988, contracted with the defendant to produce the prisms, also called "retroflectors."[3] This contract was modified in June 1989 (the "retroflector contract").

The retroflector contract required, inter alia, that the defendant produce 260 three-sided prisms made of Corning Fused Silica #7958, provided by Corning Incorporated ("Corning"). The contract required various specification levels be met, and further required that final acceptance of the retroflectors be completed at Johns Hopkins, conditioned upon approval by Johns Hopkins that the retroflectors met contract specifications.[4] On July 18, 1989, Johns Hopkins approved a testing acceptance procedure submitted by the defendant. This procedure required that, upon completion of the contract, the defendant submit to Johns Hopkins an "end-of-contract data package" which included the "CCR [corner cube retroflector] materials chart that cross references the Zygo serial number with Corning's serial number."[5]

The defendant was not a party to any contract with the Government.

On August 8, 1989, Corning notified the defendant that it had discovered "florescence" in certain lots of the silica that Corning was producing, thus indicating a raw material defect. On August 16, 1989, the defendant notified Johns Hopkins of this problem.[6] In October 1989, prior to the completion of the LRA contract,

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[3] Boies Aff. at p. 1.

[4] Laufer Aff. at pp. 2-3.

[5] Laufer Aff. at pp. 3-4.

[6] Boies Aff. at p. 2.

Johns Hopkins, NASA, Corning, and the defendant determined there were no problems with the silica provided by Corning.[7]

Corning provided the silica in the form of separately numbered cubes, which would then be turned into prisms. The defendant then numbered the cubes with a serial number to indicate the block of raw material from which each cube was cut. However, before final fabrication into prisms, the cubes had to be polished. The defendant contracted with Nitto, a Japanese corporation, to polish sixty of the cubes. In the process of polishing the cubes, Nitto polished off the serial numbers; in so doing, the "traceability" of the cubes was lost.[8] Upon receipt of the cubes, the defendant reassigned serial numbers to the cubes.[9] The sixty cubes were fashioned into 120 prisms, sixty-seven of which were manufactured into finished retroflectors.

The plaintiff alleges that Laufer directed Peeler and another employee, Joseph Pinto, to "arbitrarily" assign serial numbers to these cubes. The plaintiff alleges that he objected to this "unlawful directive." The defendant maintains that it "randomly" reassigned serial numbers to the cubes.

As part of the end-of-contract data package, the defendant provided a list to Johns Hopkins of the serial numbers which purported to match the 120 prisms which had been polished to the specific blocks of raw material from which those prisms were manufactured. The defendant concedes that the list was "inaccurate" because the traceability of those prisms had been irretrievably lost upon Nitto's polishing off the serial numbers.[10]

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[7] Boies Aff. at pp. 2-3.

[8] Boies Aff. at pp. 4-5.

[9] Laufer Aff. at pp. 5-6.

[10] Def.'s Mem. at 8.

The government entity which procured the retroflectors from Johns Hopkins was the United States Navy, under U.S. Navy SPAWAR Contract Number N00039-87-C-5301, as amended by N00039-91-C-001. This contract did not require traceability.[11] Johns Hopkins approved the quality of the retroflectors. It is undisputed that the retroflectors have functioned properly. NASA issued an award to the defendant for the high quality of the retroflectors.[12] It also issued an award to Corning for the quality of the fused silica. The TOPEX satellite successfully completed its three-year mission, and has received funding for a continued mission.[13]

On December 15, 1989, the defendant terminated the plaintiff. The plaintiff contends he was terminated for his unwillingness to go along with the alleged "cover up."

In December 1992, the plaintiff reported to the NASA Office of the Inspector General that the traceability of some of the retroflectors had been lost.

In 1994, the United States Attorney for the District of Connecticut decided not to take criminal or civil action against the defendant, finding that "no harm was done to the Government."

B. State Court Action

On December 13, 1991, the plaintiff (in his individual capacity) filed suit against the defendant in Connecticut state court. The plaintiff alleged that the defendant retaliated against the plaintiff by terminating him for his whistle-blowing. The

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[11] Laufer Aff. at p. 7.

[12] Laufer Aff. at p. 7.

[13] Boies Aff. at p. 5.

complaint did not allege any specific common law, state or federal statute as a basis for the complaint. On April 30, 1993, the case proceeded to trial. On that same day, after cross-examination of the plaintiff, and before the close of evidence, the plaintiff informed the court that he was withdrawing his complaint. The trial judge informed the plaintiff that the case would "end," and that any "case thereafter" would be "barred." The plaintiff then stated that he understood the consequences of withdrawing his action.

C. Federal Court Action

On May 15, 1995, the plaintiff instituted this action on behalf of the Government. The False Claims Act allows private citizens to initiate and prosecute such suits on behalf of the Government, known as "qui tam" actions. 31 U.S.C. § 3730(b),(d); Boisjoly v. Morton Thiokol. Inc., 706 F. Supp. 795, 807 (D. Utah 1988). The plaintiff notified the Government of the action. It declined to proceed with the suit.

II. Standard of Review

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed.R.Civ.P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994). The determination of what facts are material to a particular claim is made based on the substantive law upon which that claim rests. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248 (1986). A dispute regarding a material fact is genuine "if the evidence is such that a

reasonable [factfinder] could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In determining whether there is a genuine issue as to any material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. Anderson, 477 U.S. at 255; Gallo, 22 F.3d at 1223; Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989); Project Release v. Prevost, 722 F.2d 960, 968 (2d Cir. 1983). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

On a motion for summary judgment a court cannot try issues of fact; it can only determine whether there are issues to be tried. Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987). See Anderson, 477 U.S. at 255. The function of the court at this stage is not to weigh the evidence and determine what is true, but rather to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see also Anderson, 477 U.S. at 249.

III. Discussion

A. The False Claims Act

The defendant moves for summary judgment raising any number of defenses to the instant action. The defendant's principal contention is that since it was not a party to any contract with the Government, the admittedly erroneous list it provided Johns Hopkins as part of the end-of-contract data package cannot

constitute a "claim" within the meaning of the Act. The plaintiff, conversely, moves for summary judgment arguing that it is undisputed that the list constituted a false claim made to a government contractor under a government contract.

1. Statutory Framework

The False Claims Act imposes liability on a person who:

> knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . .

31 U.S. C. § 3729(a)(1).

The False Claim Act defines "claim" as including:

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3279(c). For the purposes of the Act, a claim is broadly defined to include "all fraudulent attempts to cause the Government to pay out sums of money." United States v. Neifert-White Co., 390 U.S. 228, 233 (1968).

The Act imposes two types of liability. First, the submitter of a false claim is liable for a civil penalty of not less than $5,000 and not more than $10,000 regardless of whether the submission causes the Government any damage. Second, the submitter of the

claim is liable for three times the damages that the Government suffers because of the false claim. 31 U.S.C. § 3729(a); United States v. Planning Research Corp., 59 F.3d 196, 199 (D.C. Cir. 1995).

The Act defines "knowingly" as:

> a person, with respect to information--
> (1) has actual knowledge of the information;
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
> (3) acts in reckless disregard of the truth or falsity of the information.

31 U.S.C. § 3729(b). The Act does not require that the submitter of a false claim had an intent to deceive when he knowingly or recklessly made the false claim. United States v. TDC Management Corp., 24 F.3d 292, 296-298 (D.C. Cir. 1994).

The typical False Claims Act case is brought by the Government against a party that directly submits a false claim to the Government. See e.g., United States v. JT Construction Co., Inc., 668 F.Supp. 592 (W.D. Tex. 1987) However, the Act creates a cause of action against a subcontractor who causes a general contractor to submit a false claim to the Government. United States v. Bornstein, 423 U.S. 303, 309 (1976) ; United States v. Consolidated Industries, Inc., 720 F.Supp. 919, 921 (S.D. Ala. 1989). Therefore, a party violates the False Claims Act if it submits a false claim to a government contractor "without regard to whether that person had direct contractual relations with the government." Pickens v. Kanawha River Towing, 916 F.Supp. 702, 706 (S.D. Ohio 1996) (citing United States ex rel. Marcus v. Hess, 317 U.S. 537, 544-45 (1943)).

2. "False Claim"

The plaintiff argues that the defendant submitted a false claim in submitting the end-of-contract data package to Johns Hopkins which erroneously indicated that the traceability of the prisms had not been lost. This package was submitted to indicate that the defendant satisfactorily completed its work under the contract, thus justifying payment. The end-of-contract data package therefore constitutes a "claim" under the Act. See Planning Research Corp., 59 F.3d at 199.

3. Damages

Based upon the undisputed facts in the record, the defendant did not engage in conduct which caused the Government to sustain damages. The defendant was not a party to the LRA contract, and that contract did not require traceability. Johns Hopkins approved the quality of the prisms. Indeed, the plaintiff concedes that the prisms have functioned in accordance with contractual specifications. Accordingly, because no harm was caused the Government, the plaintiff is not entitled to treble damages.

However, the plaintiff has shown that the defendant submitted a false claim to Johns Hopkins, under a government contract for which "the Government will reimburse such contractor . . . for any portion of the money . . . which is requested or demanded." 31 U.S. C. § 3729(a)(1) . The defendant has submitted no evidence indicating that the submission was not made with "actual knowledge." Therefore, statutory damages are to awarded in the amount of "not less than $5,000 and not more than $10,000." 31 U.S.C. § 3729(a). The plaintiff must share this award with the Government as a bounty. 31 U.S.C. § 3730(d)(2); United States ex rel. , Hopper v. Anton, 91 F.3d 1261, 1266 n. 7

(9th Cir. 1996) . The court will award a penalty of $10,000, thirty percent of which will be awarded to the plaintiff, and seventy percent to the government. 31 U.S. C. § 3730(d)(2) . The plaintiff is also entitled to reasonable expenses, reasonable attorneys' fees, and costs. Id.

B. Retaliatory Discharge

The plaintiff brings a cause of action against the defendant under anti-retaliation provision of the False Claims Act, which states in pertinent part:

> Any employee who is discharged ... because of lawful acts done ... in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.... An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S. C. § 3730(h).

The defendant moves for summary judgment on this claim, arguing that it is barred by the doctrine of res judicata because the plaintiff has already litigated the issue of his termination in the state court action. The plaintiff maintains that the state court action does not bar this claim because: (1) no entry of dismissal was entered in the state court action; and (2) the underlying facts of the complaints are different.

The doctrine of res judicata (also known as claim preclusion) precludes a litigant from advancing in a new action all claims or defenses that were or could have been raised in a prior proceeding in which the same parties or their privies were involved and that

resulted in a judgment on the merits. In re PCH Assoc., 949 F.2d 585, 594 (2d Cir. 1991) (citations omitted).

Under the Full Faith and Credit Clause of the United States Constitution, U.S. Const. Art. IV, § 1, "federal courts must accord state court judgments the same preclusive effect as other courts within that state." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984) ("issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the state where the judgment was rendered"). A review of Connecticut case law reveals that Connecticut has "adopted a transactional test as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata." Delahunty v. Massachusetts Mutual Life Ins. Co., 236 Conn. 582, 590 (1996). Thus, a claim that arises out of the same transaction or series of transactions as the originally litigated claim will be barred even if the later claim rests on a different legal theory. Connecticut Natural Gas Corp. v. Miller, No. 15474, 1996 WL 659349, at *4 (Conn. Nov. 26, 1996). To apply the transaction test, the court must "compare the complaint in the second action with the pleading and the judgment in the earlier action." Delahunty, 236 Conn. at 590.

A comparison of the state complaint and the instant complaint mandates a finding that the events at issue arise out of the same transaction in both complaints. In the state court action, the plaintiff alleged: (1) the defendant had a contract with Johns Hopkins University, portions of which were subcontracted to a "third party"; (2) the "third party" lost the "traceability" requirement of certain raw materials; (3) the plaintiff disagreed with Laufer's order to fabricate contract records; and (4) the

defendant terminated the plaintiff as a result of his unwillingness to go along in a "cover up."[14] In the instant complaint, the plaintiff repeats the same factual allegations, albeit with more detail. Perhaps the only significantly new allegation not raised in the state court action concerns the plaintiff's notification of NASA's Inspector General in 1992 of the alleged wrongdoing; nonetheless this could have been raised in the state court action, since that action went to trial after the plaintiff notified the Inspector General.

Research has revealed only once case with facts similar to the case at bar. In United States ex rel. Hindo v. University of Health Sciences/The Chicago Medical School, 1993 WL 512609 (N.D. Ill.), the plaintiff had sued in state court asserting that his termination was in violation of the state's "whistle-blower" statute. The court found res judicata applicable because the actions were based on "a single core of operative facts." Id. (citing Smith v. City of Chicago, 820 F.2d 916, 918 (7th Cir. 1987). Indeed, the court noted that the plaintiff was obligated to bring any anti-retaliation claim founded upon the False Claims Act in the state court action since federal and state courts have concurrent jurisdiction over such claims. Id. (citing United States ex rel. Hartigan v. Palumbo Bros., Inc., 797 F.Supp. 624, 631-633 (N.D. Ill. 1992).

Because the transactions at issue in the complaints are identical and the plaintiff's retaliation claim could have been brought in the state court action, he is precluded from litigating the matter here.

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[14] State Compl. at ¶¶ 10-12, 15, and 19-23.

The plaintiff attempts to circumvent the above holding by arguing that the state court did not issue an entry of dismissal; therefore, he argues, there was no judgment on the merits. Further, the plaintiff maintains that the document the clerk filed at the termination of the state court action did not result in a final judgment on the merits because it did not award costs to either party.

However, it is clear that the state court dismissed the complaint with prejudice. The following exchange took place before the trial judge:

> THE COURT: All right. You understand, Mr. Chen, once this case is withdrawn, it ends it.
>
> THE PLAINTIFF: I understand.
>
> THE COURT: There's no -- any case thereafter would be -- is barred by -- is over with? Period? No further--
>
> THE PLAINTIFF: Yes. This case is withdrawn.
>
> THE COURT: All right. Okay.

A review of Connecticut law indicates that there exists some uncertainty concerning a plaintiff's ability to reinstate a case after it has been withdrawn once a hearing has commenced. See Lusas v. St. Patrick's Church Corp., 123 Conn. 166, 169 (1937); 1 Stevenson Connecticut Civil Procedure § 155 (2d Ed. 1982). Nonetheless, it is clear from the colloquy that the case was dismissed with prejudice to its reinstatement. Accordingly, it acted as a judgment on the merits. Summary judgment is granted against the plaintiff's claim of retaliation under the False Claims Act.

IV. Conclusion

For the above reasons, the defendant's motion for summary judgment [Document No. 19] is GRANTED IN PART and DENIED IN PART. The plaintiff's motion for summary judgment [Document No. 33] is GRANTED IN PART and DENIED IN PART. The court finds that the plaintiff's retaliation claim under the False Claims Act is barred by the doctrine of res judicata. The court finds that the defendant submitted a false claim in violation of the False Claims Act. The clerk is DIRECTED to enter judgment in favor of the plaintiff in the amount of $3,000 plus reasonable expenses, reasonable attorneys' fees, and costs. The clerk is DIRECTED to enter judgment in favor of the United States Government in the amount of $7,000.

The plaintiff must file an affidavit setting forth his reasonable expenses, reasonable attorneys' fees, and costs on or before April 16, 1997. The defendant must file any opposition to such expenses on or before May 9, 1997.

The clerk is DIRECTED to CLOSE this case.

It is so ordered.

Dated at Hartford, Connecticut, this 27th day of March, 1997.

/s/ DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-second day of June one thousand nine hundred and ninety-eight.

FILED
JUN 22 1998

Chen,

Plaintiff-Appellant,

v

Dkt No: 97-7718

Zygo Corporation,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Gih-Horng Chen.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Appendix C

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Administrative Attorney

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